CONTRACTS FOR THE BENEFIT OF A THIRD PERSON IN THE CIVIL LAW.

THE confusion in our law as to the rights of a third person interested in the performance of a contract, and the fact that the same legal problem exists in the civil law, gives interest to an examination of the solutions offered by civilians to the difficulties of the case. The following translations give at least some idea of the results which have been reached.[1] The first translation may serve as a statement of the law apart from the particular provisions of the codes. Translations of some of those provisions then follow.

DERNBURG, PANDEKTEN. II. § 18, 5th ed.

Contracts are said to be "for the benefit of third persons" when the contractor stipulates for performances to be rendered to a third person, so that the latter also may enforce the contract at law.

The older Roman law simply refused to allow such contracts. The promisee could not sue because non-performance of the contract caused him no pecuniary damage, which was regarded as necessary to give rise to a right of action. Nor could the third person, because he was not a party to the contract.

This rule, however, suffered essential modifications in the later Roman law, and to-day the rule is different.

1. Even in Rome the promisee was allowed a right to sue for the performance to the third person, if he had an indirect pecuniary interest, if, for example, he had stipulated for the payment of his debt to his creditor. In the case of *bonae fidei judicia*, the law went still further. In the modern law, however, a non-pecuniary interest is universally sufficient to give the promisee a right of action, for example, if a manufacturer stipulates that performances of pecuniary value shall be rendered to the poor.

2. Even in Rome the third person was allowed in many cases an *actio utilis* in order to compel performance for himself. Espe-

[1] The leading foreign textbooks on the subject are Gareis, Verträge zu Gunsten Dritter, Würzburg (1873); Hellwig, Verträge auf Leistung an Dritte, Leipzig (1899); Pacchioni, Contratti a Favore di Terzi, Innsbruck (1898). The last-named book contains, pp. 130–139, a full bibliography of the subject.

cially if a donor had imposed as a duty on the donee at the time a gift was made, the delivery of the gift or some other performance to a third person.

Also contracts for performances to the heirs of the promisee or to one of his heirs, which were not enforceable in the classical law, were given full effect by Justinian.

According to modern common (*i. e.* non-statutory) law the third person is entitled to sue independently on contracts for his benefit, so far as this was intended in the contract.

(*a*) In consequence, the difficult question arises, When is the third person one merely appointed to receive performance, but not entitled to sue, and when may he maintain an action on his own behalf? The contracting parties themselves almost never make express statement of their intention. The judge has therefore no other resource than to consider the object of the contract and the intent of the parties as derived from that. His task is lightened by the fact that the right of the third person has by custom been established in certain kinds of contracts. This is the case in contracts for the transfer of property in which the grantor stipulates for settlements in favor of his children or wife or others standing near to him. Further, in the case of life insurance in favor of a third person.

Also the consignee named in a bill of lading of freight has by statute[1] a right of action for the delivery of the goods when the carrier has arrived at the place of delivery and has given the bill of lading to the consignee. In the case of matter sent by post the person addressed has, on the contrary, no right of action for its delivery.

(*b*) Further it is doubtful if, and until what moment the provision for the benefit of the third person can be rescinded without his concurrence. In regard to this inquiry also it is necessary to consider the particular kind of contract that is in question. Life insurance for the benefit of a third person the insured may, while he lives, destroy or transfer to others. The same is true in regard to settlements contracted for on transfers of property. The right of the consignee designated in a bill of lading to the goods is fixed as soon as the carrier has delivered the bill of lading to him after the arrival of the goods at the place of delivery.

(*c*) The right of action of the third person is rooted in the contract, is dependent on its validity, and is subject to the modifica-

[1] Handelsgesetzbuch, Art. 402, 405.

tions which the contracting parties make with reference to the provisions of the contract before the right of the third person has become irrevocable.

Yet it is an independent right, not simply the assigned claim of the promisee. Therefore, for instance, the consignee of a bill of lading in case the goods are not delivered can recover not only the damages of the consignor, but also his own.

Many claim that the third person is only entitled to enforce the right of the promisee; that his action is an *actio utilis*, that is, that of the promisee (*e. g.* Bähr). The true view is, however, that the third person enforces his own right arising from the contract. Hence he is not subject to defences of set-off arising out of other matters, to which the promisee is liable. But his right of action arises from the contract. He can, therefore, not escape defences arising from it, for example, the *exceptio non adimpleti contractus*.

GERMANY. — *Bürgerliches Gesetzbuch.*

Second Book, Second Division, Third Title. — *Promises of Performance to a Third Person.*

§ 328. A performance to a third person can be stipulated for by contract with the effect that the third person acquires a direct right to claim the performance.

If there is no definite expression of intention it is to be gathered from circumstances, especially the purpose of the contract, whether the third person acquires the right, whether the right of the third person is to arise immediately or only under certain conditions, and whether the right is reserved to the contracting parties of destroying or altering the right of the third person without his assent.

§ 329. If one party to a contract binds himself to satisfy a creditor of the other party without assuming the debt, in case of doubt it is not to be presumed that the creditor acquires the right to claim the satisfaction from him.

§ 330. If, in a contract of life insurance or for an annuity, the payment of the insurance or of the annuity is stipulated to be made to a third person, in case of doubt it is to be presumed that the third person acquires a direct right to demand the performance. The same is true when, on a gratuitous delivery to the care of another, an obligation of performance to a third person is imposed; or when, in case of a transfer of property or estate a performance

to a third person for the purpose of a settlement is promised by the grantee.

§ 331. If the performance to the third person is to ensue upon the death of the promisee, the third person acquires the right, in case of doubt, on the death of the promisee.

If the promisee dies before the birth of the third person, the promise to perform to the latter cannot be destroyed or altered unless that right has been reserved.

§ 332. If the promisee has reserved the right to substitute, without the assent of the promisor, another beneficiary in the place of the one designated in the contract, this may be done, in case of doubt, by testamentary disposition.

§ 333. If the third person rejects the right against the promisor acquired by the contract, the right shall be regarded as not acquired.

§ 334. Defences arising out of the contract are available to the promisor against the third person.

§ 335. So far as a contrary intention of the contracting parties is not to be inferred the promisee can enforce performance in favor of the third person, although the latter has the right to the performance.

Fifth Division. — *Assumption of Debts.*

§ 414. A debt can be assumed by a third person by contract with the creditor, so that the third person takes the place of the previous debtor.

§ 415. If the assumption of the debt is agreed upon by the third person and the debtor, the effect depends on the acceptance of the creditor. The acceptance can take place only after the debtor or the third person has notified the creditor that the debt has been assumed. Until acceptance the parties to the contract can alter or rescind it.

If acceptance is refused, the debt is to be regarded as not assumed. If the debtor or the third person demand of the creditor a declaration within a fixed limit of time, whether he accepts, the acceptance can be expressed only within that time. If not expressed it is to be regarded as refused.

So long as the creditor has not communicated his acceptance, the one assuming the debt is, in case of doubt, to be regarded as liable to the debtor to satisfy the creditor at the proper time. The same is true if the creditor refuses his assent.

§ 416. If the purchaser of real estate assumes by contract with the grantor a debt of the grantor which is secured by a mortgage of the real estate, the creditor can accept the assumption only if notified by the grantor. If six months have elapsed since the receipt of the notice, the acceptance is to be regarded as given, unless the creditor has previously notified the grantor of his refusal. The provisions of § 415, ¶ 2, sentence 2, are not applicable.

The notice of the grantor can be given only after the purchaser has been entered as owner in the registry of deeds. The notice must be given in writing and must contain the statement that the purchaser has assumed the place of the previous debtor unless the creditor expresses his refusal within six months.

The grantor must when requested by the purchaser notify the creditor of the assumption of the debt. As soon as the giving or refusing of acceptance is settled the grantor must notify the purchaser.

§ 417. The one who assumes the debt can set up against the creditor the defences which arise out of the legal relation between the creditor and the previous debtor. A claim belonging to the previous debtor cannot be set off.

The one who assumes the debt cannot set up against the creditor defences arising from the legal relations between himself and the previous debtor, upon which the assumption of the debt was based.

§ 418. In consequence of the assumption of a debt the sureties and pledges for it are released. If the claim is secured by a mortgage the effect is the same as if the creditor had renounced the mortgage. These provisions do not apply if the surety or he to whom the pledged property belongs at the time of the assumption of the debt assents to such assumption.

A right of priority in bankruptcy belonging to the claim cannot be made effective in bankruptcy as against the property of the one who assumes the debt.

§ 419. If any one acquires by contract the property of another, the latter's creditors can, without prejudice to the continuance of the liability of the previous debtor, enforce against the grantee also, from the formation of the contract, the claims which they had at that time.

The obligations of the grantee are limited to the amount of the granted property and the rights belonging to him by virtue of the contract. If the grantee sets up the limitation of his liability

the provisions of §§ 1990, 1991 with reference to the liability of heirs are applicable.

The obligation of the grantee cannot be excluded or limited by agreement between him and the previous debtor.

SWITZERLAND. — *Code Fédéral des Obligations.*

§ 128. One who, acting in his own name, has stipulated for an obligation in favor of a third person, has the right to enforce performance for the benefit of the third person.

The third person, or his successors in interest, can also personally demand performance when such was the intention of the parties. In such a case, if the third person notifies the debtor that he wishes to exercise the right, the creditor cannot afterwards release the debtor.

FRANCE. — *Code Civil.*

Art. 1119. No one can in general bind himself or stipulate in his own name, except for himself.

Art. 1121. A party may likewise stipulate for the benefit of a third person when such is the condition of a stipulation that he makes for himself, or of a donation that he makes to another. He who has made this stipulation can no longer revoke it if the third person has declared his wish to take advantage of it.

Art. 1165. Contracts have no effect except between the contracting parties. They do not impose liability upon a third person, and they do not give him any rights except in the case covered by Art. 1121.

Art. 1166. Nevertheless creditors can make use of all the rights and actions of their debtor except those which are wholly personal.[1]

[1] The French Code has had a wide influence upon the legislation of the Latin countries of Europe and America. A few countries have directly copied from the sections here translated:

BELGIUM. — *Code Civil.*

The French Code is in force.

HOLLAND. — *Burgerlijk Wetboek* (the French translation of G. Tripels has been used).

Articles 1351, 1353, 1376, 1377 are translations of the articles of the French Code given above.

ITALY. — *Codice Civile.*

Articles 1128–1130 are translations of Articles 1119, 1121, 1165 of the French Code.

UPPER CANADA. — *Civil Code.*

Articles 1029 and 1031 are translations of Articles 1121 and 1166 of the French Code.

LOUISIANA. — *Civil Code.*

Art. 1890. A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract cannot be revoked.

SPAIN. — *Codigo Civil.*

Art. 1257. Contracts only have effect between the parties who made them, and their heirs. . . .

If the contract contained any stipulation in favor of a third person, the latter may exact its fulfilment provided that he has made known his acceptance to the obligor, before revocation by him.

PORTUGAL. — *Codigo Civil.*

There is no provision on the subject.

MEXICO. — *Codigo Civil.*

Art. 1277. Contracts bind only the parties to them.

BRAZIL. — *Codigo Civil.*

Art. 1957. Contracts neither injure nor benefit third persons (except in the following cases). . . . They only benefit such persons when they are made in favor of a third person, and he expressly or tacitly accepts them.

ARGENTINE REPUBLIC. — *Codigo Civil.*

Art. 1196. Unless forbidden creditors can make use of all rights and actions of their debtor, except such as are personal.

Art. 1199. Contracts cannot be set up against third persons, nor taken advantage of by them, except in the cases of articles 1161 and 1162. (These articles relate only to cases of agency.)

URUGUAY. — *Codigo Civil.*

Art. 1230. If any one, contracting in his own name, has stipulated for any benefit in favor of a third person, and has no authority to represent him, such third person can exact the fulfilment of the obligation, if he has accepted it and has notified the obligor thereof, before revocation.

Art. 1267. Contracts cannot be set up against third persons, nor taken advantage of by them, except in the cases of articles 1228 to 1230.

PERU. — *Codigo Civil.*

Art. 1259. . . . A contract may be made in favor of a third person, even without his consent.

In this last case the contracting parties are not free to rescind the contract if the third person has accepted the stipulation.

Art. 1261. The creditors of a person who has rights acquired under a contract may be authorized to enforce them, unless the debtor is entitled to delay in making payment of his debt.

JAPAN. — *Civil Code.*

Art. 537. If one of the parties bind himself by the contract to make some payment to a third person, the latter is entitled to demand such payment direct from the debtor.

The right of the third person under the circumstances mentioned in the preceding clause is created when he expresses to the debtor his intention to enjoy the benefit accruing to him from the contract.

Art. 538. After the right of the third person has in accordance with the provisions of the preceding article been created, the parties to the contract can neither change nor extinguish it.

Art. 539. A defence which is based on a contract such as that mentioned in Article 537, may be set up by the debtor against the third person who will benefit by the contract.

The main deductions warranted by these extracts from foreign codes may be briefly summarized. It is very instructive to observe that, although the Roman Law refused to recognize any legal right in the beneficiary of a contract, the modern civil law almost universally gives him a direct remedy. As this result was in violation of what had formerly been the law, it is a strong indication that there is a real necessity for the relief of the beneficiary. It must not be thought, however, that the term "beneficiary" necessarily includes a creditor whose debtor has been given a promise to pay the debt, though it certainly does sometimes. Such a creditor was allowed in the Roman Law an *actio utilis*, that is, an action to enforce a right of his debtor. In the French and some of the other codes the creditor is given such an action, so that if he has

no right of his own, he is entitled to satisfy his claim by enforcing on behalf of his debtor the latter's right of action. It is possible that even where codes make no express provision for such a remedy, it is nevertheless allowed.

The selections from the German Code deserve particular attention, because that code is the most recent and the most carefully considered of the codes, and the subject is more elaborately treated there than in any other code. The fundamental idea of the German legislators was evidently to give effect to the intention of the contracting parties. If they intended the third person should have a right of action, he is to have it. As such intentions are frequently not expressed, the code gives some rules to be applied in cases where the intention is doubtful. The Swiss Code, also, makes intention the governing fact. The sections of the German Code on the assumption of debts provide a useful means for fixing, so that they cannot be mistaken, a creditor's rights when the debt due him has been assumed by a third person. If the creditor, when notified, assents to the arrangement, there is a novation, and his only right is against his new debtor. If he does not assent, his only direct right is against his original debtor, but the latter has a right against the one who assumed the debt.

Samuel Williston.